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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON
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In the Court of Criminal Appeals of Texas
At Austin

FILED
COURT OF CRIMINAL APPEALS
6/19/2018
DEANA WILLIAMSON, CLERK

DEDRIC D'SHAWN JONES,
Appellant

v.

THE STATE OF TEXAS,
Appellee

No. 01-15-00717-CR
In the Court of Appeals
For the First District of Texas
At Houston

No. 1452040
In the 248th District Court
Of Harris County, Texas

RESPONDENT'S BRIEF ON DISCRETIONARY REVIEW

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FACTS

Appellant was charged with assault after he slapped his girlfriend. The complainant, Amy Jimenez, did not testify.

Appellant, Jimenez, and their one-year-old daughter lived with Jimenez's mother, Adeline Gonzales. According to Gonzales, they were watching a movie together when Appellant made inappropriate comments during a racy scene. 4RR39-41. Jimenez became angry and a loud argument ensued, prompting Gonzales to leave the room with the baby and Appellant to go into the garage. 4RR40, 78. Thereafter, Jimenez joined Appellant in the garage because she needed to run an errand. 4RR41-42. Jimenez was screaming at Appellant and asking where her keys were, while Appellant ignored her and focused on his cell phone. 4RR42, 51, 79.

According to Gonzales's testimony, Jimenez "whacked" the phone in Appellant's hand, and in response, Appellant hit her on the face "pretty hard," causing a cut on the inside of her lip. 4RR43-44, 51. Appellant told Jimenez that her keys were in her car and she drove away. 4RR85. Gonzales told Appellant to leave and called "911." 4RR44-45, 52. While Gonzales waited for police to arrive, Appellant engaged in threatening behavior: "ransacking" the house; yelling obscenities; trying grab the phone from Gonzales; kicking in the doors of Gonzales's car; swinging a car jack in the air; and grabbing the baby from Gonzales's arms. 4RR53-59. Thereafter, Appellant put the baby down, went into the house, and exited

through the back door. 4RR58-59; 74. When Jimenez returned home a few minutes later, she was angry and repeatedly asked Gonzales why she had called the police. 4RR60.

According to Appellant's testimony, after the verbal argument Appellant went into the garage and sat on the floor playing a game on his cell phone. 4RR143-44. Jimenez came into the garage to talk to Appellant several times, "trying to pick a fight," but he ignored her. 4RR145-46. Jimenez "karate kicked" Appellant's hand "pretty hard," causing the phone to fly out, and Appellant slapped her. 4RR146.

Responding HPD Officer J. Portillo observed that Jimenez was angry and refused to cooperate with the police. 4RR119-120. Eventually Jimenez gave a statement but she did not request that Appellant be arrested or charged. 4RR133-134. Portillo noted that Jimenez's face was red and that she had a cut inside her lip. 4RR120-121. Portillo did not see damage to any property or any evidence that the house had been ransacked. 4RR122, 126.

SUMMARY OF THE ARGUMENTS

First Ground for Review: The majority of the court of appeals correctly found that the trial court erred in denying Appellant the right to pursue cross-examination to expose Gonzales's possible motive and bias. The majority recognized that her potential bias could stem from either her interest in obtaining custody of Appellant's child or preventing Appellant from maintaining custody of

the child. The proponent of impeachment evidence need only show circumstances that might tend to show, by human experience, possible animus or motive. Gonzales's awareness of the ongoing custody proceedings, her history as the child's caretaker, and the child's temporary placement with her sister were crucial facts in demonstrating her potential bias. Accordingly, the offer of proof provided a factual basis showing a logical connection between Gonzales's potential bias and her testimony.

Second Ground for Review: The error is not harmless because Appellant's testimony was sufficient to raise self-defense. A defendant does not have to testify concerning his subjective state of mind to raise self-defense as long as there is some evidence in the record to show that the defendant was in reasonable apprehension of being the recipient of the unlawful use of force from the complainant. Appellant's testimony established that his use of force was an immediate response to an actual attack by Jimenez: she stood over him while he sat in a "tight little space" between two cars and "karate kicked" his hand "pretty hard." There is no evidence that Appellant acted with a retaliatory purpose in striking Jimenez; he did not escalate the violence, nor was his responsive use of force delayed, prolonged, or disproportionate. Accordingly, Appellant's testimony was sufficient to raise a reasonable doubt as to whether his use of force was immediately necessary to protect him against Jimenez's use or attempted use of unlawful force. Because Gonzales

was the sole eye-witness to testify for the State, the court of appeals correctly found that harm cannot be ruled out beyond a reasonable doubt.

ARGUMENTS

I. The court of appeals correctly held that Gonzales's interest in the outcome of pending CPS proceedings was a proper area for cross-examination.

A. The offer of proof established a logical connection between Gonzales's interest the termination of Appellant's parental rights and her testimony.

In arguing that there was no causal or logical connection between the CPS proceeding and any potential bias or motive, the State focuses on the fact that the offer of proof did not establish that Gonzales wanted custody of Appellant's daughter or had taken steps to obtain custody of her.[1]

The majority of the court of appeals correctly recognized that Gonzales's potential bias could stem from either "her interest in obtaining custody of his child or preventing appellant from maintaining custody of the child." *Jones v. State*, 540 S.W.3d 16, 30 (Tex. App.—Houston [14th Dist.] 2017, pet. granted).

The offer of proof, which is set out in the State's Brief,[2] establishes the following facts:

[1] State's Brief at 8-9.
[2] State's Brief at 5-6.

1) Gonzales was aware of pending CPS proceedings to terminate Appellant's and Jimenez's parental rights;
2) Gonzales believed that Appellant and Jimenez had demonstrated that they were unfit parents (when asked whether she had a preference as to the outcome, she testified: "That damage has been done between the both of them.");
3) the child had been temporarily placed with Gonzales's sister;
4) before that placement Gonzales had been the child's primary caretaker (Gonzales volunteered the following testimony: "And before that she was with me. I've had her. I've always had her."); and
5) Gonzales did not think the child was safe with Appellant ("that's why I take care of her because I want her to be safe … She deserves to be safe.").

4RR93-94. This testimony demonstrates, at a minimum, that Gonzales had a preference that Appellant's rights be terminated, and strongly suggests that she had an interest in the child being placed with her or one of her close relatives. Despite Gonzales's weak attempts at diplomacy ("I don't have any say in that"), her feelings on the issue are palpable.

Whether these feelings were justified is beside the point. A defendant is entitled, subject to reasonable restrictions, "to show any relevant fact that might tend

to establish ill feeling, bias, motive, interest, or animus on the part of any witness testifying against him." *Billodeau v. State*, 277 S.W.3d 34, 42 (Tex. Crim. App. 2009).

Moreover, as noted in the majority opinion, Gonzales's testimony on direct examination "showed a deep possessory interest in the child" and included lengthy, graphic, and irrelevant testimony about her attempts to protect the child from Appellant. *Jones* at 31. She testified that Appellant went on a violent rampage and yelled, "Get your own F'ing baby. This is my F'ing baby." 4RR56. She further testified that he tried to grab the child from Gonzales's arms and "could have ripped her spinal cord." 4RR57.

Without knowledge of the pending CPS proceedings, the jury could not contextualize this testimony. Gonzales's awareness of the ongoing custody proceedings, her history as the child's caretaker, and the child's temporary placement with her sister were crucial facts in demonstrating her potential bias. The offer of proof provided a factual basis showing a logical connection between Gonzales's potential bias and her testimony.

The required "causal connection" or logical relationship "is a matter of simple relevance under Rule 401." *Irby v. State*, 327 S.W.3d 138, 149 (Tex. Crim. App. 2010). "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable

or less probable than it would be without the evidence." *Mendiola v. State*, 21 S.W.3d 282, 284 (Tex. Crim. App. 2000); Tex. R. Evid. 401. "[E]vidence merely tending to affect the probability of the truth or falsity of a fact in issue is logically relevant." *Id.*, quoting *Montgomery v. State*, 810 S.W.2d 372, 376 (Tex. Crim. App. 1990). Evidence is relevant "even if it only provides a 'small nudge' in proving or disproving a fact of consequence to the trial." *Id.* The offer of proof in this case meets this low threshold for relevance.

B. A direct admission is not a required predicate for cross-examination concerning bias or motive.

The State argues that Appellant was required to show that Gonzales believed the criminal case would impact the CPS case against Appellant and that she had "involve[d] herself in the custody case."[3] The State's analysis is too restrictive.

Parties are allowed "great latitude" to show facts that "would or might tend to establish" bias or motive. *Carpenter v. State*, 979 S.W.2d 633, 634 (Tex. Crim. App. 1998). "The possible animus, motive, or ill will of a prosecution witness who testified against the defendant is never a collateral or irrelevant inquiry." *Billodeau*, 277 S.W.3d at 42. The scope of permissible cross-examination is "necessarily broad." *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996). "A defendant is entitled to pursue all avenues of cross-examination reasonably calculated to

[3] State's Brief at 7, 11.

expose a motive, bias or interest for the witness to testify." *Id*. Discussing the breadth of that scope, this Court has stated:

> ... Evidence to show bias or interest of a witness in a cause covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is infinite. The rule encompasses all facts and circumstances, which when tested by human experience, tend to show that a witness may shade his testimony for the purpose of helping to establish one side of the cause only.

Id. at 498, quoting *Jackson v. State*, 482 S.W.2d 864, 868 (Tex. Crim. App. 1972). Thus, the proponent of impeachment evidence need only show circumstances that "might tend" to show, by human experience, "possible" animus or motive.

This latitude is reflected in the Rules of Evidence. Rule 104, which governs a trial court's decision as to preliminary questions on the admissibility of evidence, expressly "does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility." Tex. R. Evid. 104(e).

There is no legal requirement that the proponent of impeachment evidence must be able to prove the proffered line of cross-examination, nor is there any requirement that the witness admit bias. The Court has recognized that bias can influence a witness's testimony on an unconscious level. *Griffin v. State*, 491 S.W.3d 771, 789 (Tex. Crim. App. 2016), reh'g denied (June 15, 2016). The fact that the Rules of Evidence permit introduction of extrinsic evidence if a witness denies bias or motive demonstrates that even a direct denial does not preclude the inquiry. Tex. R. Evid. 613 (b); *Hammer v. State*, 296 S.W.3d 555, 563 (Tex. Crim. App. 2009).

It is common sense that a conviction for family violence would negatively impact a parent's position in CPS termination proceedings. Accordingly, Appellant's right to explore the issue was not contingent on whether Gonzales was actively involved in the CPS proceedings, or whether she was aware of the legal intricacies set out in the Family Code regarding the appointment of a managing conservator. Gonzales's knowledge of and apparent attitude concerning the CPS proceedings fall within the wide range of external circumstances that, when tested by human experience, would tend to show possible bias or motive. The State would have the opportunity to rehabilitate Gonzales by showing that she did not want custody or did not care about the outcome of the CPS investigation, but such testimony, if elicited, would not preclude Appellant's right to pursue an avenue of cross-examination reasonably calculated to expose a motive or bias.

Contrary to the State's arguments, the court of appeals' ruling will not lead to "baseless, prejudicial cross-examination of third-party witnesses in any family-violence case where the defendant and complainant are co-parents."[4] This case presents unique circumstances: (1) a pending CPS proceeding to terminate the rights of both parents, and (2) the key prosecution witness had been the child's primary caretaker. Moreover, the inquiry is not inherently prejudicial; on the contrary, many would view a grandparent's concern and willingness to assume care of a child as

[4] State's Brief at 9.

admirable. Appellant's counsel's questions on the issue were entirely tactful and respectful.

These unique facts also undercut the State's argument that cross-examination for bias concerning child custody disputes is limited to one parent testifying against the other parent. The State suggests that the cases relied on by the majority are thus distinguishable.[5] *See Fox v. State*, 115 S.W.3d 550 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (trial court erred in limiting cross-examination of a mother concerning her interest in obtaining child custody in a pending divorce proceeding to establish her motive to implant the suggestion of the father's sexual abuse of the children); *Ryan v. State*, 04-08-00594-CR, 2009 WL 2045211 (Tex. App.—San Antonio July 15, 2009, no pet.) (mem. op. not designated for publication) (trial court erred in limiting cross-examination of the defendant's ex-wife, who was the complainant in the charged assault, about an ongoing child custody dispute).

In contrast to *Ryan* and *Fox*, the offer of proof here showed that there were termination proceedings against both parents and the child had been temporarily placed with Gonzales's sister. Accordingly, the pool of potentially interested parties was not limited to the parents, so it is irrational to suggest that only a parent could harbor a bias or motive.

[5] State's Brief at 11-12.

C. *Irby* and the cases cited therein are distinguishable.

The only cases cited by the State in support of its arguments involve cross-examination concerning a witness's criminal conduct, a topic that is clearly more sensitive and deserving of special scrutiny in order to prevent needless harassment and prejudice.

The State cites *Irby v. State*, 327 S.W.3d 138 (Tex. Crim. App. 2010), and cases collected in a footnote as the basis for its arguments that there was no "logical connection" between Gonzales's potential bias and her testimony.[6] Every one of these cases involved cross-examination based on the witness's criminal conduct where there was no evidence that the witness stood to benefit from a "deal" with the State. *Id.* at 150 n.43.

Irby concerned cross-examination of the complainant in a child sexual assault prosecution concerning the complainant's juvenile record. *Id.* at 140. The defendant asserted that complainant's juvenile deferred-adjudication probation placed him in a vulnerable relationship with the State and allowed impeachment for bias. *Id.* The Court noted that juvenile criminal records and adjudications are not admissible to impeach the general credibility of a testifying witness under Rule 609(d) of the Texas Rules of Evidence. *Id.* at 147. This provision, as well as various Family Code

[6] State's Brief at 10-11,

provisions, reflect the important interest in protecting the anonymity of juvenile offenders. *Id.* at 152.

The Court observed that it had previously held that pending charges in federal court do not logically create the possible bias for a witness testifying in state court absent additional facts of a potential "deal" between state and federal authorities. 979 S.W.2d at 634, discussing *Carpenter*, 979 S.W.2d at 634-35. Accordingly, the Court rejected the argument that the mere fact of probation status is "always and inevitably sufficient" to establish a witness's potential bias and motive to curry favor with the authorities. *Id.* at 152. Examining the facts of the case, the Court concluded that, based on the timing of the complainant's outcry, there was no logical connection between his juvenile record and a motive to concoct false accusations of sexual assault. *Id.* at 154.

These cases dealt with an additional consideration not present here, namely, that the basis for the potential bias—criminal conduct—is inherently prejudicial. Courts have long recognized that a trial judge may impose reasonable limits on cross-examination based upon concerns about harassment, prejudice, and humiliation. *Carroll v. State*, 916 S.W.2d 494, 498 (Tex. Crim. App. 1996), citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). But, as discussed above, an interest in a child custody determination is not

inherently prejudicial, humiliating, or stigmatizing, and there is no indication in the offer of proof in this case of any intent to annoy, harass, or humiliate the witness.

Additionally, the logical connection in this case was apparent. In contrast to *Irby* and *Carpenter*, where there was no evidence that the witnesses stood to gain anything with respect to their criminal cases, the offer of proof and other evidence in this case established that Gonzales had, at a minimum, an interest in Appellant's parental rights being terminated. Whereas the logical connection in *Irby* and *Carpenter* was entirely severed because there was no evidence of a deal with the prosecution for favorable treatment, there is a direct logical connection between Gonzales's interest in the outcome of the termination proceedings and a possible motive to shade her testimony against Appellant in his trial for domestic violence.

Accordingly, the court of appeals correctly found that the trial court erred in denying Appellant the right to pursue cross-examination to expose Gonzales's possible motive and bias.

II. The error was not harmless because Appellant produced sufficient evidence to establish a reasonable doubt as to self-defense.

A. The evidence was sufficient to raise self-defense.

Under Chapter 9 of the Texas Penal Code, "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." Tex. Penal Code § 9.31(a) (West 2014). "The use of force against

another is not justified" either "in response to verbal provocation alone" or "if the actor provoked the other's use or attempted use of unlawful force." *Id.* § 9.31(b)(1), (4).

In raising the justification of self-defense, a defendant bears the burden of production, which requires the production of some evidence that supports the particular justification. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). "[E]ven a minimum quantity of evidence is sufficient to raise a defense as long as the evidence would support a rational jury finding as to the defense." *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013). Once a defendant produces such evidence, the State bears the burden of persuasion to disprove the raised defense beyond a reasonable doubt. *Zuliani* at 594.

Contrary to the State's arguments, direct evidence of a defendant's state of mind is not a categorical requirement to raise self-defense. It is well-established that a defendant's intent and state of mind may be proved without direct evidence. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). Intent can be inferred from the conduct of, remarks by, and circumstances surrounding the acts engaged in by the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. 1982). Even for a specific intent crime, direct evidence of the requisite intent is not required. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002). For example, the specific intent

to kill may be inferred from the use of a deadly weapon per se. *Moreno v. State*, 755 S.W.2d 866, 868 (Tex. Crim. App. 1988).

Accordingly, the defendant does not have to testify concerning his subjective state of mind to support of finding of self-defense, as long as there is some evidence in the record to show that the defendant was in reasonable apprehension of being the recipient of the unlawful use of force from the complainant. *Smith v. State*, 676 S.W.2d 584, 585 (Tex. Crim. App. 1984).

In *Smith*, the defendant was arguing with his sister when the complainant intervened. 676 S.W.2d at 585. The evidence showed that the complainant was holding a gun and the defendant was holding a knife. The complainant grabbed the defendant, the two scuffled, and the defendant stabbed the complainant. *Id.* at 586. One witness heard the complainant threaten to hurt the defendant if he messed with his sister. *Id.* The defendant's mother testified that he told her that the complainant had been trying to hurt him so he had taken the gun away from the complainant and had stabbed him. *Id.* While there was no direct evidence of the defendant's state of mind, the Court held that evidence raised self-defense. *Id.* at 587.

Thus, even in the absence of direct evidence of the defendant's state of mind, the defense may be raised where there is evidence that the defendant's use of force was an immediate response to an actual or attempted assault. In contrast, where a defendant preemptively uses force, more evidence of his subjective state of mind

may be necessary to support a jury finding that the use of force was immediately necessary.

Intermediate courts of appeals have similarly found self-defense raised by evidence that the defendant immediately responded to an actual or attempted attack, even without direct evidence of the defendant's subjective intent. In *King v. State*, 05-00-00250-CR, 2001 WL 51060 (Tex. App.—Dallas Jan. 23, 2001, no pet.) (not desig. for pub.), a witness testified that three men had jumped on the defendant in a parking lot. *Id.* at *1. The defendant armed himself with a gun, and the defendant and the complainant were both shot during a struggle. *Id.* While the defendant did not testify, the court of appeals found that the evidence that the defendant had been attacked, if believed, was sufficient to support a finding that he reasonably feared unlawful force. *Id.* at *2.

In *VanBrackle v. State*, 179 S.W.3d 708, 714 (Tex. App.—Austin 2005, no pet.), four witnesses testified that the decedent pointed a pistol at the defendant. *Id.* at 714. The defendant called for help and, with the help of another man, disarmed the decedent. *Id.* The decedent then began to fumble in his pocket as if to pull out another object. *Id.* At this point the defendant shot him. *Id.* The court of appeals held that the evidence was sufficient to raise an issue as to whether appellant reasonably believed that the decedent was reaching for another weapon, that retreat was not a viable alternative, and that shooting the decedent was immediately

necessary to protect himself against the use or attempted use of unlawful deadly force. *Id.*

In these cases the courts held that the jury could find from the circumstances (the defendant's immediate use of force in response to an actual or attempted attack) that the defendant feared additional violence and used force based on a belief that doing so was necessary to prevent additional violence.

Appellant's testimony established that his use of force was an immediate response to an actual attack. Appellant testified that after a verbal altercation with Jimenez he exited the house, went into the garage, and sat between two cars playing a game on his phone. Jimenez came to him several times, "trying to pick a fight," but he ignored her. Appellant was in a "tight little space" sitting between two cars with Jimenez standing over him when she "karate kicked" his hand. He described it as "a pretty good karate kick" that hit his hand "pretty hard." Appellant immediately slapped her. 4RR144-46. The evidence showed that he had no way to retreat and he did not escalate the violence. Appellant's testimony is sufficient to raise a reasonable doubt as to whether his use of force was immediately necessary to protect him against Jimenez's use or attempted use of unlawful force.

B. There was no evidence of retaliation.

The State claims that Appellant's use of force was in retaliation rather than self-defense. But State has identified no evidence that indicates retaliation. In each

of the cases cited by the State evidence of an apparent retaliatory purpose compelled the court of appeals to find that the evidence was inconsistent with self-defense.

In *Ivy v. State*, 07-15-00023-CR, 2016 WL 6092524 (Tex. App.—Amarillo Oct. 17, 2016, no pet.) (mem. op. not desig. for pub.), the defendant grabbed the complainant's cell phone away, and, trying to get it back, she pushed and hit him. *Id.* at *1. The defendant pushed her to the ground and stepped on her stomach and ribs. *Id.* After a break in the interaction, the defendant pulled the complainant to the ground and struck her in the face twice. *Id.* He then tried to prevent her from leaving by ripping her clothes and standing in front of her car, and he followed her when she left. *Id.* at *3. While the defendant had some injuries, the court of appeals found that this sequence of events was inconsistent with someone who was acting in fear of an assault. *Id.* Specifically, there was nothing to indicate that his continued assault and pursuit of the complainant was necessary to protect himself. *Id.*

In *Daisy v. State*, 05-01-01791-CR, 2002 WL 31528723 (Tex. App.—Dallas Nov. 15, 2002, no pet.) (mem. op. not desig. for pub.), the complaint told responding officers that the defendant beat her and threatened to kill her. *Id.* at *1. At trial the complainant testified for the defense and recanted her report to police: she testified that she initiated the physical fight and that appellant only struck her afterwards in retaliation. *Id.* Because the only evidence of the defendant's state of mind was that

he acted in retaliation, the court of appeals found that the evidence did not raise self-defense. *Id.* at *2.

In *Reynolds v. State*, 07-11-00500-CR, 2012 WL 6621317, at *1 (Tex. App.—Amarillo Dec. 19, 2012, no pet.) (mem. op. not desig. for pub.), the defendant's girlfriend told officers that he hit her and choked her to the point that she could not breathe or see. *Id.* at *1. The defendant initially feigned ignorance of the matter but later he explained that the complainant had kicked him and, in response, he "snap[ped]" and hit her. *Id.* The court of appeals held that his characterization indicated that his use of force was out of anger rather than for protection, so no self-defense instruction was warranted. *Id.* at *4.

In *Garcia v. State*, 05-12-01693-CR, 2014 WL 1022348 (Tex. App.—Dallas Mar. 13, 2014, pet. ref'd) (mem. op. not desig. for pub.), the defendant was angry with his business partner because he owed him money and would not return his calls. *Id.* at *2. He drove to the decedent's house with a gun and shot him. *Id.* In a police interview the defendant claimed that the gun accidentally discharged, but at trial he also claimed self-defense. *Id.* The defendant testified that the decedent rushed at him and he had to react quickly. *Id.* at *4. The court of appeals held that self-defense was not raised because, even if the decedent rushed at the defendant, the decedent was not armed and made no verbal threat. *Id.* at *7. Additionally, when asked if he was fearful, the defendant simply testified that he did not "like being pummeled." *Id.*

Accordingly, there were no facts in the record that would lead to a reasonable belief that he was in fear of death or serious bodily injury. *Id.*

In this case, there is no evidence of a retaliatory purpose or any other state of mind that is inconsistent with self-defense. There is no evidence that Appellant provoked or pursued Jimenez; instead, he had retreated to the garage to avoid a fight. There is no evidence that his responsive use of force was delayed, prolonged, or disproportionate; he struck Jimenez only once immediately after she kicked him.

Rather than pointing to evidence of a retaliatory purpose the State relies solely on the arguments of defense counsel as having "presented the slap as retaliation, not as preventing future violence."[7] It is axiomatic that "the arguments of the parties and their trial theories are not evidence." *Cary v. State*, 507 S.W.3d 750, 755 (Tex. Crim. App. 2016). Accordingly, statements made by counsel in argument have no bearing on whether the evidence is sufficient to raise a defensive issue. *See Gonzales v. State*, 474 S.W.3d 345, 350 (Tex. App.–Houston [14th Dist.] 2015, pet. ref'd) (rejecting State's arguments, based on statements made in defense closing argument, that the appellant was not entitled to a self-defense instruction because "arguments of counsel are not evidence").

Moreover, the arguments of trial counsel were not inconsistent with self-defense. Counsel characterized "mutual combat" as a variant of self-defense: "If

[7] State's Brief at 14-16.

somebody comes up to me and slaps me in this courtroom, I can slap them right back. Why? Because I don't want you to keep doing it and I don't have to retreat." 4RR168. This characterization does not describe retaliation but rather an intent to prevent future harm, which, as acknowledged by the State, is the crux of self-defense.[8]

C. Because the evidence raised self-defense, the court of appeals correctly found that harm could not be ruled out beyond a reasonable doubt.

The majority of the court of appeals applied the correct harm analysis standard. *Jones* at 33-34. Errors in limiting cross-examination are subject to a harm analysis for constitutional error. TEX. R. APP. P. 44.2(a). To determine harm from an improper limitation of cross-examination, a reviewing court must determine, assuming that the damaging potential of the cross-examination was fully realized, whether the error was harmless beyond a reasonable doubt. *Jones* at 34. The court reviews the error in connection with the following factors: (1) the importance of the witness's testimony in the State's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the State's case. *Id*.; *Van Arsdall*, 475 U.S. at 684, 106 S.Ct. 1431.

[8] State's Brief at 16.

The sole issue in the case was whether Appellant acted in self-defense when he slapped Jimenez. Gonzales's testimony was crucial to the State's case and was not cumulative—she was the only eyewitness to testify for the State.

The majority of the court of appeals noted that Gonzales first testified that Jimenez "whacked" the phone in Appellant's hand, but later testified that he merely "slapped" the phone. *Jones* at 34. Gonzales's testimony was contradicted by the responding officer as to the extent of Jimenez's injuries. Gonzales testified that Jimenez's mouth swelled into "a big ball on her lip," while Officer Portillo testified that Jimenez "had redness to the face" and a cut on her upper lip and that her eyes were watering. *Id.* Gonzales also testified that Appellant "kicked her car doors in" and "ransacked" the house but Officer Portillo saw no evidence of ransacking or of damage to any property in the garage. *Id.*

Appellant was not permitted the opportunity to effectively cross-examine the key prosecution witness about her knowledge of the pending CPS investigation and the child's temporary placement with Gonzales's sister. Because Appellant was prevented from inquiring into Gonzales's motivations, the State was able to convincingly argue that Gonzales did not have a "vendetta" against Appellant and was telling the truth. 4RR174.

Jimenez did not testify, so the strength of the State's case depended entirely on the jury's evaluation of Gonzales's testimony. The undisputed evidence showed

that Appellant had retreated to the garage from a verbal altercation; that the complainant pursued Appellant, screamed at him, and, when he ignored her, provoked him physically; and that the complainant never wanted to pursue assault charges. Effective cross-examination of the only eye-witness would have significantly impacted the strength of the State's case.

The majority of the court of appeals correctly found that harm cannot be ruled out beyond a reasonable doubt.

PRAYER

Appellant/Respondent respectfully requests that the Court affirm the judgment of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This document has been served on the following parties electronically through the electronic filing manager contemporaneously and in conjunction with e-filing on June 19, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i), the undersigned attorney certifies that the relevant sections of this computer-generated document have **5,331** words, based on the word count function of the word processing program used to create the document.

/s/ Adam Banks Brown